having been a duty in that sense: one example is given by Lord Cranworth L.C. in *Ramsden* v. *Dyson*: 'If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion in order afterwards to profit by the mistake which I might have prevented.

The question in this case is whether any duty of that kind arises when a person learns that another person is holding and relying on a forged deed which bears to be signed by him. It is unnecessary to enter on any general consideration of the basis of this kind of duty because there is cogent authority in favour of there being a duty of this kind on a person who becomes aware that another person holds a forged deed which purports to be signed by him, and there does not appear to be any direct authority to the contrary effect. . . .

In their Lordships' judgment it must be held that the respondents were not entitled to withhold from the appellant information that the appellant's mortgages were forgeries, and that when they chose to do so they took the risk that they would later be estopped from asserting that these deeds were forged if by reason of their keeping silent the appellant suffered detriment. . . .

In their Lordships' judgment this is the true test: the chance of recovering must have been materially prejudiced by the delay. In the present case their Lordships are of opinion that the appellant has not shown that he was materially prejudiced by the delay. The appellant took no action when he was told of the forgery, and he did not give evidence in this case. In the absence of any explanation from him, and the whole trend of the evidence being to show that he would not have taken any action even if he had been told of the forgery earlier, their Lordships are not prepared to assume that he might have done so, and it is only on that assumption that he can have suffered any possible prejudice by the delay. Their Lordships therefore hold that no estoppel arises from the respondents having delayed to inform the appellant that his mortgages were forged".

Although P.W.6 (Syed Abdulrahman bin Abdullah Alsagoff) was not adjudicated a bankrupt until 29th September, 1961, his act of bankruptcy was committed on 17th May, 1961. By virtue of section 46 of the Bankruptcy Ordinance (Cap. 11) his bankruptcy is deemed to relate back to and commence at the time of the act of bankruptcy. Since the fraud was not discovered till May, 1961 when the act of bankruptcy occurred, even if the defendants had been notified of the alleged forgery in May, 1961, they could never have successfully pursued their remedies against the bankrupt then. It should also be noted that section 51 of the Bankruptcy Ordinance avoids certain voluntary settlements made by the bankrupt prior to his bankruptcy. As Mr. Mallal put it, if anything had been recovered it would have had to be returned.

It should also be remembered that police investigations, which had commenced in May, 1961, were not completed until after some time and that the bankrupt was only finally convicted in March, 1962. It should also be borne in mind that civil proceedings would ordinarily await the conclusion of criminal proceedings founded on the same facts.

It is always a difficult task to decide which one of two innocent parties should suffer, but I have no choice, having regard to the state of the law as it stands and having regard to the facts of the particular case as found by me.

I have, therefore, no alternative but to deliver judgment in favour of the plaintiff as claimed with costs and to extend my sympathies to the defendants for the unhappy position in which they now find themselves.

Judgment for the plaintiff.

Solicitors: *Mallal & Namazie; Rodyk & Davidson.*

VAEYAPURI v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Pike C.J. (Borneo) and Gill J.), October 19, 1965]

[K.L. — Federal Court Criminal Appeal No. 7 of 1965]

Penal Code, s. 302 — Murder — Summing-up — Failure to direct jury of the possibility of lesser verdict of culpable homicide not amounting to murder.

The appellant was convicted of murder. According to the prosecution story the appellant being to some extent under the influence of liquor went to the house of his wife from whom he was separated, made an attack on members of her family and subsequently struck a violent blow with a heavy parang on the deceased woman. The appellant's story was that he went to the house peacefully although he had a parang with which he used to cut firewood; that he was attacked and that he really did not know how the dead woman came by her injury. The learned trial judge put the case to the jury as a clear cut choice between murder and no offence If, he said, the prosecution evidence was believed it was a case of murder; if the appellant's defence was accepted it was a case of no offence. The appellant was found guilty. On appeal,

Held: there was as a possibility that if it had been left to them, the jury might have been prepared to take the view that the killing of the deceased woman happened while the appellant was disengaging himself from some sort of combat initiated by him and in that event it would have been open to them to find the appellant guilty of something less than murder, that is culpable homicide not amounting to murder;

(2) in the circumstances of the case, the Federal Court would substitute a conviction for culpable homicide not amounting to murder.

Cases referred to:—

(1) *R.* v. *Carr-Briant* [1943] K.B. 607.

(2) *Kwaku Mensah* v. *King* [1946] A.C. 83, 92.

FEDERAL COURT.

K. Rajanayagam for the appellant.

Ajaib Singh (Deputy Public Prosecutor) for the respondent.

Thomson L.P. (delivering oral judgment): This appellant was convicted for murder in contravention of section 302 of the Penal Code.

The charge against him was that on the afternoon of 15th January this year at certain Public Works Department Labourers' Lines near Segamat he committed murder by causing the death of a woman Angamah.

Against his conviction he has now appealed.

There is no question, and indeed it has never been in real controversy, that the appellant killed the woman Angamah. He killed her by striking her a violent blow on the side of the neck with a heavy parang as a result of which she died almost immediately. At the trial there was, as might be expected, a great deal of controversy as to the circumstances in which this injury was caused but somewhat curiously there was no very clear evidence of any motive which might have induced the appellant to kill this particular woman. There was evidence of trouble between the appellant and his wife and other members of his family but there was no evidence as to any antecedent trouble between the appellant and deceased.

The prosecution story was that the appellant being to some extent under the influence of liquor went to the house of his wife from whom he was separated, made an attack on members of her family and subsequently attacked the deceased woman who happened to come to the house.

The appellant's story, on the other hand, was that he went to the house perfectly peacefully although he happened to have in his hand a parang which he used to cut firewood; that he was attacked and that he really did not know how the dead woman came by her injury. Whether or not the appellant was attacked, as he said, it is clear that whatever happened at the house was not altogether one-sided because the appellant was examined by a doctor about an hour and a half after the killing and was then found to have a wound on his head which required stitching and which was still (to use the words of the doctor) "spurting blood".

The whole case was summed up to the jury in a lengthy and, as regards the evidence, accurate summing-up by the trial judge.

In the event he left the case to the jury as one of murder or nothing.

After relating the evidence for the prosecution he came to the evidence of the appellant which he dealt with as follows:—

> "According to the accused's story, he was cutting firewood.....He happened to have a parang in his hand. When he went there he was attacked by three persons — Sethu, Selvaratnam and Ramasamy (all of them prosecution witnesses.) Then he said these men caught hold of him. In order to free himself he tried to stretch out both his hands. I think that is his explanation as to how the deceased got the injury on the neck."

Then he went on:—

> "If you accept as reasonably true his story how the deceased could have got the injury on the neck, then he is entitled to an acquittal. He was trying to free himself from two men who were holding him against his will. If you believe the accused's story even on the balance of probabilities, then he is entitled to an acquittal."

In our view the dichotomy between murder and nothing was too clear cut. True, if the prosecution evidence was accepted, it was a case of murder. True, if the appellant's evidence was accepted, it might well be a case of no offence. There was, however, the third possibility that although on the balance of probabilities (and after all that is the *Carr-Briant* [1] test) the jury might not have been prepared to accept the appellant's story as true yet they might have been prepared to treat it as something which made them less than altogether sure as to the truth of the prosecution evidence or to its validity as making out murder.

In our view there is a possibility (we do not say a probability) that if it had been left to them the jury might have been prepared to take the view that the killing of the deceased woman happened while the appellant was disengaging himself from some sort of combat for initiating which he may or may not have been responsible. In that event in our view it would have been open to the jury to say it was a case of something less than murder, that is culpable homicide not amounting to murder. As I say, we express no view beyond this, that there was a possibility.

In that connection we have guided ourselves by the following passage from Lord Goddard in the case of *Kwaku Mensah* v. *The King*:— [2]

> "On an indictment for murder it is open to a jury to find a verdict of either murder or manslaughter, but the onus is always on the prosecution to prove that the offence amounts to murder if that verdict is sought. If on the whole of the evidence there is nothing which could entitle a jury to return the lesser verdict the judge is not bound to leave it to them to find murder or manslaughter. But if there is any such evidence then, whether the defence have relied on it or not, the judge must bring it to the attention of the jury, because if they accept it or are left in doubt about it the prosecution have not proved affirmatively a case of murder."

Considering the present case in the light of these words we think we are bound to set aside the conviction for murder.

That brings us to the question of what in the circumstances we ought to do. We have come to the conclusion that no useful purpose would be served by ordering a retrial. We therefore substitute for the murder conviction a conviction for culpable homicide not amounting to murder in contravention of section 304 of the Penal Code and impose a sentence of life imprisonment.

Order accordingly.